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NO. 93-914

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In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT O. CUPIT AND DONNA BLAIR CUPIT
Petitioners

VERSUS

McCLANAHAN CONTRACTORS, INC., FORMERLY AWI DRILLING AND WORKOVER, INC.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WOOD BROWN (3584)
Montgomery, Barnett, Brown, Reed Hammond & Mintz
3300 Energy Centre
1100 Poydras St.
New Orleans, LA 70112
(504) 585-3200

BEST AVAILABLE COPY

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Applicant has stated the issues presented for review and we have proceeded with this brief in the context of those framed issues.

LIST OF PARTIES

The parties to this action are:

ROBERT OLEN CUPIT

AWI DRILLING & WORKOVER, INC.

Note: Due to the promulgation of a number of opinions to the effect that she had no claim for loss of consortium, the claim of Mrs. Donna Cupit was dismissed prior to the commencement of the trial.

The defendant is named in the application as McClanahan Contractors, Inc. and there is a reference to the fact that this corporation was formerly known as AWI, Inc. This allegation is true as far as it goes. However, for business reasons not related to this or any other lawsuit, the assets of AWI Drilling & Workover, Inc. (a new corporation, sometime hereinafter referred to as AWID&W, Inc.) some time prior to the accident which befell the plaintiff. The corporate form of AWI, Inc. continued in existence under the name "McClanahan Contractors, Inc." However, at the time of this accident, the employer of the plaintiff (and of Doyle Samples, the toolpusher, and the owner of Rig 8, the vessel involved) was AWID&W, not AWI.

This was all corrected by agreement in the trial Court. See the judgment and the "Findings and Conclusions" of the trial Court (Pages A-10, A-12 of the Application filed in this court.) Wherein the party litigant appearing as defendant is, properly, AWID&W, Inc. We checked

LIST OF PARTIES (continued)

our pleadings in this case and the Notice of Appeal, the Supercedeus Order and the briefs of Defendant-appellant all make proper reference.

There is no issue made of this at this point. However, since the defendant is misnamed in the pleadings before this Court, confusion is possible and this will hopefully be avoided by this explanation.

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STATEMENT OF THE CASE

1. Manner of Proceeding

Plaintiff's claim against the defendant was under the Jones Act and the general maritime law. Defendant specially pleaded the Limitation of Liability Act (46 U.S.C. Section 181, et sec.). The claim of the plaintiff was tried to a jury which found the defendant guilty of negligence[1], found the vessel unseaworthy and found plaintiff guilty of thirty (30%) percent contributory negligence. The jury assessed plaintiff's damages at $300,000 and the assessment of 30% negligence had the effect of reducing his recovery to $210,000.

The district judge bifurcated the defensive claim under the Limitation of Liability Act and tried that at a later date without a jury using the evidence adduced in the Jones Act trial and such other evidence as the parties saw fit to adduce at that time. During the course of this hearing, the value of the vessel was shown to be $131,200.00. However, the district court determined that the toolpusher was a "managing agent", sufficiently high in the corporate hierarchy of the defendant such that his knowledge and participation in the accident was attributable to top management of the defendant corporation and, because of this finding, limitation was denied.

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[1] In two places in the application, appellant specifically states that the jury found the toolpusher and the president guilty of negligence (See pages 6 and 13]. This is just simply wrong. It didn't happen. Neither individual was a party to the litigation, so that a finding of personal negligence was not necessary and no special interrogatory questions were propounded for any purpose.

Defendant appealed. Defendant paid the plaintiff the amount of the limitation fund (since he was entitled to that even if the defendant prevailed on appeal) and bonded out the remainder of the judgment.

The Court of Appeal found that the toolpusher was not sufficiently high in the corporate heirarchy to constitute him a "managing agent". As a result of this finding, the judgment of the district Court was reversed and rendered and the application to this Court followed.

Statement of the Facts

The accident in this case occurred because plaintiff sought to use the "fill-up" line to bleed off pressure which had been pumped into the well stem. The fill-up line was used to put drilling mud into the system when needed. Since it penetrated into the line, it could be and was used for the bleed off of much lower pressures and there was no contraindication to that. It theoretically could have been misused to bleed off high pressures but the testimony was unanimous and uncontradicted that this should not have been done.

The issue in this application has to do with the toolpusher's status as a "managing agent"[2]. The facts of

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[2] This is the critical determination in this case. It is so because, for purposes of the applicability or the denial of Limitation, negligence of an employee of a corporate vessel owner is not attributable to the corporation unless it is the knowledge and the negligence of a person sufficiently "high up" in the corporate heirarchy. This is different, of course, where the determination is of Jones Act responsibility vel non. In such latter case, any negligence of any employee is attributable to the employer for purposes of assessing Jones Act responsibility. See the distinction

this record determinative of that issue are as follows[3]:

Fact Packet "A"

The toolpusher was Doyle Samples, Samples was a long time oil field hand, familiar with all aspects of the operation of a drilling and workover rig such as Rig 8. He was in charge of all operations aboard the rig. He supervised all employees and operations aboard the rig. He is in charge of safety and has authority to shut down the operation if it becomes unsafe and this extends to actions taken or requested by representatives of the oil company, owner of the well. He supervises the employees in this accident. He reported daily to the corporate office by telephone and by radio. In general, he had authority over and charge of all phases of operation on Rig 8.

Fact Packet "B"

All facts contained in Fact Packet "A", above - plus - Samples' job was the same as the toolpushers aboard each of the company's other rigs, and there were ten of these, each manned by a Toolpusher who was board seven days

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(footnote 2 continued)

drawn and supported in the opinions of *Tittle v. Aldacosta*, 544 F.2d 752 (5th Cir. 1977) and *Mac Towing Co. v. American Comm. Lines*, 670 F.2d 543 (5th Cir. 1982).

[3] In its "Findings and Conclusions", the district court found certain facts upon which it based its judgment. These are set out hereinafter under the rubric "Fact Packet 'A' " for want of a better term. The Court of Appeals found these facts and certain additional facts which are set out hereinafter as "Fact Packet 'B' ". There is no dispute as to any fact set out hereinafter and each fact is fully and appropriately established by the record in this case.

then was relieved for seven days by a relief toolpusher. When the particular job being performed was completed, Samples had no say in what was done with the rig at that time, had no say in any new job that might be performed. His authority did not extend to the basic business decisions made by drilling supervisors and the president of the company.

There is no factual dispute as to any of these facts, either in Packet "A" or Packet "B". Put differently, there is agreement among those who testified in this case about each of these facts.

SUMMARY OF ARGUMENT

1. There is no pure fact finding by the appellate Court, only a decision whether to consider certain facts shown by the record, thus no violation of the manifest error rule.

2. Alternatively, the manifest error rule was properly invoked by the appellate court in this case.

3. The suggestion that there is a dispute between the circuits is not demonstrated by applicant.

ARGUMENT ON THE ISSUES FRAMED BY APPLICANT

The district court decided the case on the basis of the facts set forth above in Fact packet "A". The Court of Appeals reversed taking into consideration those facts set forth in Fact Packet "A". Plaintiff essentially takes the

position that this action constitutes a violation of the manifest error rule and that the judgment of the Court of Appeals should be reversed on this ground.

We disagree for two reasons. The decision of the Court of Appeals is not that a fact considered by the district court was true or not or was wrongly decided, the decision was whether to consider a particular fact or set of facts which everyone admits to be true and correct. We respectfully submit that the decision whether to consider a particular fact or set of facts or not to consider those facts is more a legal matter than purely a factual matter. If this is so, then there was no violation of the manifest error rule.

Alternatively, a Court of Appeals has the duty to test factual conclusions against a standard enuncuiated by this and other Courts. That test is met when the factual finding of the lower Court leaves the reviewing Court with the definite and firm conviction that a mistake has been made. The rule was enunciated by the appellate court in this instance (see 1 F.3d at 348, Application here, Page A-6) in the context of a decision that the Court in this case was obliged to consider all the facts, those in Packet "B" as well as those in Packet "A". No reason is advanced by applicant here that this was somehow improper and no suggestion of such is patent on the face of the papers.

Plaintiff also makes the contention that the opinion of the appellate court somehow creates a dispute between the circuits. However, this point is not developed and no dispute between the circuits is demonstrated in argument.

ARGUMENT - THE CORRECTNESS VEL NON OF THE DECISION BELOW

The "point-counterpoint" demonstrating the correctness of the decision of the Court of Appeal in this case is found detailed in prior jurisprudence of the Fifth Circuit in the two opinions in *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d 455 (5th Cir. 1982) and at 706 F.2d 1365 (5th Cir. 1983). There are discussions of the law with respect to limitation and particularly the facts which would require a determination that a particular employee was "high enough up" in the corporate heirarchy to be a "managing agent" whose knowledge would bind the corporation in this context. See specifically 677 F.2d at 466-68 and 706 F.2d at 1375-77. The employee there was one Gary Freeman. The boat owner was a land developement corporation. It had what the Court refers to as a "navy" for entertainment purposes and as a source of additional income from charters arranged by the boat captain. Freeman had complete authority in the operation of this separate phase of the boatowner's business. He was paid out of the income he generated. He had carte blanche (sic) to make charters. In short, he had the broad unlimited agency powers necessary for his knowledge and negligence to bind the corporate owner of the vessel to his negligence and knowledge.

Specifically, he had the broad general agency powers that Samples did not have. The discussion in the two Continental/Bonanza opinions clearly set forth the law and demonstrate that there is no "other circuit" problem in the case at bar.

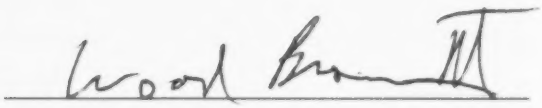
CONCLUSION

There being no violation of the manifest error rule and there being no palbable legal error in the conclusion reached, we respectfully submit that the application by plaintiff for the issuance of this Court's writ of certiorari should be denied.

WOOD BROWN
Montgomery, Barnett, Brown, Reed Hammond & Mintz
3300 Energy Centre
1100 Poydras St.
New Orleans, LA 70112
(504) 585-3200

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition has been forwarded to all attorneys of record on this the 7th day of January, 1994, by depositing same in the U.S. Mail.



Wood Brown